

**Leong Yick Realty Co Sdn Bhd v Asia Commercial
Finance (M) Bhd**

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HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 563 OF
1992

HAIDAR J

20 APRIL 1994

B

Civil Procedure — Foreclosure proceedings — Shortfall after property was sold —
Whether could constitute a debt — Whether winding-up proceedings could be brought

C

Civil Procedure — Foreclosure proceedings — Shortfall after property was sold —
Whether could constitute a debt — Whether defendant should proceed by way of a separate
action against the plaintiff to recover shortfall

D

Companies and Corporations — Winding up — Shortfall after property was sold on
order of court — Whether could constitute a debt — Whether winding-up proceedings could
be brought — Companies Act 1965

The plaintiff agreed to sell to a company, PTI, pieces of land belonging to the plaintiff for a consideration of RM700,000. An agreement of sale and purchase was duly executed by the parties. PTI later nominated its 'associate company', Bumi Armada, to act on its behalf in all financial transactions and acquired a fixed loan from the defendant to settle the balance of the purchase price. Bumi Armada, PTI and the defendant arranged a third party charge to be created with the plaintiff's land as security for a loan out of which the plaintiff would be paid the balance of the purchase price. Bumi Armada received the loan and a portion of it was paid to the plaintiff. Bumi Armada defaulted in repayments, and the defendant proceeded with the foreclosure proceedings on the third party charge. As a result of the sale of the lands as ordered by the court, there was a shortfall of a sum of RM566,277.73, which is the sum the defendant claimed is a debt due to it from the plaintiff. The plaintiff's contention was that the land had been sold and the loan was granted to enable completion of the sale to take place. Therefore, the plaintiff no longer had any interest in the land. The plaintiff filed an originating summons against the defendant asking that an injunction be given to stop the defendant from filing a petition to wind up the plaintiff.

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Held, finding for the plaintiff:

It was not correct for the defendant to contend that the shortfall arising out of the foreclosure proceedings would constitute a debt in which the defendant was entitled to proceed for a winding-up proceeding. In any event, as the debt was disputed by the plaintiff, the defendant should proceed by way of a separate action against the plaintiff to recover the shortfall.

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A [Bahasa Malaysia summary]

- Plaintif telah bersetuju menjual beberapa bidang tanah yang dimiliki olehnya kepada sebuah syarikat, PTI, untuk RM700,000. Suatu perjanjian jual beli telah disempurnakan oleh kedua-dua pihak. PTI kemudiannya telah menama 'syarikat bersekutunya', Bumi Armada, untuk bertindak bagi pihaknya dalam semua transaksi kewangan dan telah memperolehi suatu pinjaman tetap daripada defendan untuk membiayai baki harga belian. Bumi Armada, PTI dan defendan telah mengaturkan supaya suatu gadaian pihak ketiga diwujudkan dengan menggunakan tanah plaintif sebagai cagaran untuk pinjaman daripada mana plaintif akan dibayar baki harga belian. Bumi Armada telah menerima pinjaman itu dan sebahagian daripadanya telah digunakan untuk membayar plaintif. Bumi Armada telah gagal membuat pembayaran balik dan defendan telah memulakan prosiding perampasan atas gadaian pihak ketiga itu. Akibat penjualan tanah itu atas arahan mahkamah, terdapat kurangan sebanyak RM566,277.73, iaitu jumlah yang dituntut oleh defendan sebagai suatu hutang yang kena dibayar oleh plaintif kepadanya. Plaintif menyatakan bahawa tanah itu telah dijual dan pinjaman itu telah diberi untuk membolehkan jualan itu disempurnakan. Oleh itu, plaintif tidak lagi mempunyai kepentingan di dalam tanah itu. Plaintif telah memfailkan suatu saman pemula terhadap defendan supaya satu injunksi diberi untuk menyekat defendan daripada memfailkan petisyen penggulungan untuk menggulung plaintif.

Diputuskan, membuat keputusan memihak kepada plaintif:

- Adalah tidak betul untuk defendan menyatakan bahawa kurangan yang timbul akibat prosiding perampasan itu merupakan suatu hutang yang membolehkan defendan memulakan prosiding penggulungan. Lebih-lebih lagi, oleh sebab hutang itu dicabar oleh plaintif, defendan sepatutnya mengambil tindakan yang berasingan terhadap plaintif untuk mendapat balik kurangan itu.]

G Notes

For cases on the winding up of a company, see 3 *Mallal's Digest* (4th Ed, 1994 reissue) at paras 399–570.

Cases referred to

- H** 1 *Malaysian International Merchant Bankers Bhd v G & C Securities Sdn Bhd & Anor* [1988] 2 MLJ 471 (refd)
2 *Securicor (M) Sdn Bhd v Universal Cars Sdn Bhd* [1985] 1 MLJ 84 (refd)
3 *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 (refd)
4 *Hongkong & Shanghai Banking Corp Ltd v Wan Mohd bin Wan Ngah* [1991] 3 MLJ 119 (refd)
- I** 5 *Re Lympne Investments Ltd* [1972] 2 All ER 385; [1972] 1 WLR 523 (refd)

6 *Re Nima Travel Sdn Bhd* [1986] 2 MLJ 375 (refd)

7 *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447 (distd)

S Gunapati (Rozinah Nizaruddin, S Gunapati & Co) for the plaintiff.
A Navamani (TS Chong & Co) for the defendant.

Cur Adv Vult

Haidar J: The plaintiff, Leong Yick Realty Co Sdn Bhd, filed this originating summons against the defendant, Asia Commercial Finance (M) Bhd (encl 3), seeking the following orders:

- (1) Asia Commercial Finance (M) Bhd dalam tindakan ini disekat dan satu injunksi diberi untuk menyekat defendan daripada memfailkan petisyen penggulangan untuk menggulung Leong Yick Realty Co Sdn Bhd, plaintiff di sini.
- (2) Asia Commercial Finance (M) Bhd, defendan di sini disekat dan satu injunksi diberi untuk menyekat defendan daripada mengiklankan petisyen penggulangan yang dimaksudkan terhadap Leong Yick Realty Co Sdn Bhd, plaintiff di sini.
- (3) Relief selanjutnya atau yang lain.
- (4) Kos permohonan ini dibayar oleh defendan kepada plaintiff.

This originating summons is supported by the affidavit of Mak Hin Kern, the director of the plaintiff, dated 20 August 1992 (encl 2).

The defendant opposed this originating summons by way of the affidavit of Gan Lian Peng, a branch manager of the defendant, dated 20 October 1992 (encl 4).

The filing of this originating summons by the plaintiff was prompted by the notice issued by the defendant under s 218(1)(e) of the Companies Act 1965 ('the Act') demanding that unless a sum of RM566,277.73 was paid to the defendant winding up proceedings would be instituted against the plaintiff (see pp 1-2 of the bundle of documents annexed to encl 2). Upon receipt of the notice of winding up, the plaintiff by its solicitors wrote to Bumi Armada Navigation Sdn Bhd ('Bumi Armada'), the nominee of PTI Development and Construction Sdn Bhd ('PTI') that the plaintiff would be seeking indemnity against it. The plaintiff, however, did not proceed further as the defendant's action against Bumi Armada was then still pending (see para 5 of the affidavit of Mark Hin Kern at encl 5).

The issue of the purported debt owed to the defendant by the plaintiff is centred on a third party charge executed by the plaintiff in favour of the defendant. It would then be appropriate for me to set out the brief facts leading to the execution of the third party charge and the filing of this originating summons by the plaintiff.

On or about 18 October 1983, the plaintiff agreed to sell and PTI agreed to purchase 21 pieces of lands situated in the Mukim of Mersing belonging to the plaintiff for a consideration of RM700,000. An agreement of sale and purchase was duly executed by the parties (see pp 3-8 of the bundle of

- A documents annexed to encl 2). According to the sale and purchase agreement, the completion date is 21 December 1983. For reasons best known to the parties, PTI in June 1985 nominated its 'associate company', Bumi Armada, to act on its behalf in all financial transactions and had acquired a fixed loan from the defendant to settle the balance of the purchase price (see p 9 of the bundle of documents annexed to encl 2). Bumi Armada confirmed this arrangement (see pp 10 and 11 of the bundle of documents to encl 2).

- Bumi Armada, PTI and the defendant arranged a third party charge to be created with the plaintiff's lands as security for a loan out of which the plaintiff would be paid the balance of the purchase price. Bumi Armada received the loan sum and a portion of it was paid to the plaintiff with the consent of Bumi Armada (see p 12 of the bundle of documents to encl 2). It would appear that the defendant and Bumi Armada apparently had strong business relations, for the defendant even agreed to waive personal guarantees from its directors (see p 13 of the bundle of documents attached to encl 2). It is interesting to note that even though the price was tagged at RM700,000 the defendant was prepared to extend the loan to the tune of RM850,000!

- D Be that as it may, apparently Bumi Armada defaulted in repayments, and the defendant proceeded with the foreclosure proceedings on the third party charge by instituting Originating Summons No 31-300 of 1986 in the High Court here. The defendant, it would appear, also took action against Bumi Armada vide Johor Bahru High Court Suit No 25-107/89. Legal action was also taken against Abdul Aziz bin Mokhtar, a director of Bumi Armada as the guarantor of the loan and judgment against him had been entered and he had been adjudicated a bankrupt by the High Court here on 23 March 1992 vide in Bankruptcy No 43-801/88 (see para 15 of the affidavit of Gan Lian Peng in encl 4). The plaintiff did not contest the foreclosure proceedings as apparently the lands had been sold and the loan was granted to enable completion of the sale to take place.

- E As a result of the sale of the lands as ordered by the court in Originating Summons No 31-300 of 1986 (see exh 'ACF-3') there is a shortfall of a sum of RM566,277.73. This is the sum that the defendant claimed is a debt due to it from the plaintiff. The plaintiff's contention is that the lands had been sold and the loan was granted to enable completion of the sale to take place. The plaintiff no longer has any interest in the lands. However, the defendant is relying, inter alia, on cl 14 in the annexure to the charge (exh 'ACF-1') which reads:

- H If the amount realized by the chargee or the sale of the land under the provisions of the National Land Code after deduction and payment thereof from the proceeds of such sale of all fees, dues, costs, charges and other expenses is less than the amount due to the chargee and whether at such sale the chargee is the purchaser or otherwise the chargor shall pay to the chargee the difference between the amount due and the amount so realized and until payment will also pay interest on such balance at the ruling rate.

- I The defendant further relies on cl 19(b) of the annexure to the charge to support its claim of the liability of the plaintiff for the shortfall. Clause 19(b) reads:

Though as between the borrower and the chargor the chargor is a surety only for the borrower yet as between the chargor and the chargee the chargor shall be a principal debtor and the said land shall be the principal security for the sums of money due under this charge and accordingly the chargor and the said land and every part thereof shall not be released at any time or by any indulgence given to the borrower or by any act matter or thing whereby the chargor as surety only on the said land and any part thereof might have been released and discharged *provided always* nothing herein shall prejudice the rights of the chargee from making a first recourse against the chargor or the borrower or against both the chargor and the borrower jointly and severally before making recourse to the realization of this security of the chargee at their sole discretion so deem fit.

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It would appear, therefore, that the liability of the plaintiff and Bumi Armada is co-extensive, that is, the defendant has a first recourse against the plaintiff or Bumi Armada or against both jointly and severally before making recourse to the realization of the security of the lands charged by way of third party charge.

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The law

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It is then pertinent for me to examine the issues before me and the laws applicable in so far as this originating summons of the plaintiff goes.

I do not think it can be disputed of the right of the defendant to institute actions against both the plaintiff and Bumi Armada or either one of them by virtue of cl 19(b) (see *Malaysian International Merchant Bankers Bhd v G & C Securities Sdn Bhd & Anor*¹). However, the issue here in so far as the plaintiff is concerned is whether there is a debt due within the meaning of s 218(1)(e) of the Act in order to get an order of winding up of the plaintiff as the defendant intended to do in which the plaintiff presently is trying to prevent by this originating summons.

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From the facts it would appear that the plaintiff did not respond to the notice of demand issued pursuant to s 218 of the Act other than writing to Bumi Armada intimating that the plaintiff would seek indemnity against it and the filing of this originating summons against the defendant. In the circumstances, would the failure to respond to the notice to pay the sum as demanded constitute the plaintiff as a debtor or a creditor-debtor relationship results? It is to be noted that the presumption under s 218(2)(a) of the Act is rebuttable and in this respect, VC George J in *Securicor (M) Sdn Bhd v Universal Cars Sdn Bhd*² said:

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It is to be noted that it is not the neglect to meet the demand of the creditor that gives the jurisdiction to the court to order that the company be wound up but the inability of the company to pay its debts. It is the presumption arising from the neglect to meet the demand that gives the court the jurisdiction. This presumption is rebuttable.

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Further, apart from the s 218(2)(a) presumption, there is nothing else to suggest that the plaintiff is anything but solvent.

The filing of this originating summons by the plaintiff would indicate that the plaintiff is disputing the debt allegedly owing to the defendant.

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- A The issue really is centred on whether there was a debt and if there was, whether it is in dispute and there are grounds to support it. Our Supreme Court in dealing with the resulting order under s 256 of the National Land Code 1965 in *Kandiah Peter v Public Bank Bhd*³ stated at p 122:

- B A chargee who makes an application for an order of sale in foreclosure proceedings under s 256 of the [National Land Code 1965] does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. *The chargee therefore, does not sue for a debt.* It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. *The order for sale when made under s 256 of the [National Land Code 1965] is not a judgment or a decree.* (Emphasis added.)

- C In the circumstances, for the defendant to contend that the shortfall arising out of the foreclosure proceedings would constitute a debt in which the defendant is entitled to proceed for a winding up proceedings would not be correct.

- D In any event, as the debt is disputed by the plaintiff, the defendant should proceed by way of a separate action against the plaintiff to recover for the shortfall. In fact, the case of the *Hongkong & Shanghai Banking Corp Ltd v Wan Mohd bin Wan Ngah*,⁴ relied on by counsel for the defendant, would seem to support that a separate action need to be taken against the plaintiff to recover the shortfall. The learned judge said at p 122:

- E If the amount realized from the sale is not sufficient to cover the amount due then it is implied that a separate action may be taken against the debtor/chargor to recover the balance should he fail to pay the chargee the difference.

In *Re Lympne Investments Ltd*,⁵ Megarry J stated [at p 389]:

- F If there is liability, a failure to discharge that liability may well be 'neglect' whether it is due to inadvertence or obstinacy or dilatoriness; but a challenge to liability is a challenge to the foundation on which any contention of 'neglect' in relation to an obligation must rest.

In *Re Nima Travel Sdn Bhd*,⁶ Shankar J said [at p 375]:

- G There is a plethora of authorities to the effect that a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company.

Further on the same page, his Lordship stated:

- H The proper course of action for the plaintiff the moment they knew their claim was disputed, was to establish their debt by filing an action to have the matter adjudicated upon in the usual way.

The case of *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd*⁷ relied on by counsel for the defendant is of no application as the respondent though disputing the appellant's claim, admitted that it owed the appellant a sum of RM60,580 and this sum, according to the Supreme Court, is substantial. The Supreme Court said at p 448:

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The amount of the admitted and unpaid debt is substantial, and it was almost half of the amount claimed by the appellant. Therefore the appellant should not be prevented from pursuing its petition so that the court would be able to consider all evidence and determine whether it should exercise its discretion to order winding up or not to order it.

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On the facts and the authorities, I am of the view that this is a proper case where the court should exercise its discretion in favour of the plaintiff. In the circumstances I make an order in terms of this originating summons.

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Order accordingly.

Reported by Jeanne Tan

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